12-7-2011

State v. Hanner Respondent's Brief Dckt. 38203

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NO. 38203
	)	
vs.	)	
	)	
JOBY LEE HANNER,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF JEFFERSON

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District Judge

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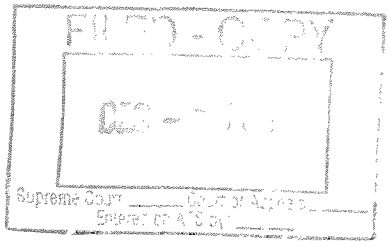

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STATEMENT OF THE CASE

Nature Of The Case

Joby Lee Hanner appeals from his conviction for leaving the scene of an injury accident.

Statement Of The Facts And Course Of The Proceedings

At about 9:00 p.m. on April 7, 2010, Brenda Fullerton parked her Dodge truck on the street in front of a post office in Ririe, and went into the post office to pick up her mail. (Tr., p.3, L.24 – p.4, L.4; p.19, Ls.1-2; p.29, L.21 – p.31, L.13.) Ms. Fullerton checked her post office box, and as she walked back to her truck, she heard the squealing and burning of tires, which scared her. (Tr., p.31, L.23 – p.32, L.4.) Ms. Fullerton walked to the door of her truck, and when she looked up, she saw Hanner's truck coming at her, and instead of opening her door, she turned to run. (Tr., p.32, Ls.10-21.) However, after Ms. Fullerton took two steps, the backend of Hanner's truck hit her, and smashed her into her own truck, causing her to flip up in the air and down onto the ground. (Id.) Hanner left the area with the tires of his truck still burning as Ms. Fullerton lay on the ground. (Id.)

Ms. Fullerton was taken by ambulance to a hospital, where it was determined she had suffered two broken ribs, four broken bones in her lower back, and massive soft tissue bruising to her legs, back, stomach and "everywhere." (Tr., p.34, Ls. 6-16.) She was initially released from the hospital after three days, but two weeks later, she had to be re-hospitalized due to a pulmonary embolism in her lungs. (Tr., p.34, Ls.16-23.) Ms. Fullerton remained

in the hospital seven more days, including five days in intensive care, and, as she testified, "twice they thought they were going to lose me." (Tr., p.34, L.17 – p.35, L.3.)

Justin Mangis was at the Maverik store across the street from the post office that same evening, and saw Hanner walk out of the store, yelling at "his girlfriend or somebody that he was with, [get] into his [60's black Ford] pickup and started squealing his tires right at the gas pump and headed out onto the road and when he was headed out lost kind of control and hit the lady, Brenda Fullerton." (Tr., p.4, Ls.10-15; p.6, Ls.21-23.) Mr. Mangis explained that when Hanner's pickup spun out of control, the back end of the truck hit Ms. Fullerton as she turned to run away from her own truck, which she had been starting to enter. (Tr., p.8, L.23 – p.9, L.8.)

After his truck hit and seriously injured Ms. Fullerton, Hanner continued to drive away. (Tr., p.9, L.23 – p.10, L.5.) Mr. Mangis ran to Ms. Fullerton's assistance and stayed with her until emergency medical personnel arrived. (Tr., p.5, L.15 – p.6, L.11.) Mr. Mangis noticed that Ms. Fullerton's truck sustained a dent from where her body had been pushed into it, a dent which appears to have been subsequently noted by Deputy Sheriff Williams in his investigation of the crime scene. (Tr., p.13, Ls.10-24; p.45, L.25 – p.46, L.5.)

Brandy Hayes was working as a cashier at the Maverik store when Hanner struck Ms. Fullerton with his truck, and noticed that, while in the store, Hanner and the woman he was with "acted as though they were upset with each other." (Tr., p.18, L.25 – p.20, L.6; p.23, L.20 – p.24, L.2.) When Hanner and the

woman got into Hanner's truck, "the tires just spun, like laid rubber on the pavement and he spun out around the gas pump" and "fishtailed out of the parking lot and then out on the road," causing Ms. Hayes to fear the truck would tip over. (Tr., p.20, Ls.18-24.) Ms. Hayes said she saw "the rear end of the pickup [as it] swung back around toward the Post Office, [and] there was a pickup truck parked in front of it, a white Dodge truck, and [she] saw it rock back and forth like it had been hit and customers from the parking lot had ran over in front of the Post Office and a woman had come back and said call 911." (Tr., p.20, L.24 – p.21, L.7.) Ms. Hayes noticed, and wrote down, the license plate number of Hanner's truck as it came around the corner. (Tr., p.22, Ls.10-13.)

After the license plate number of the out-of-control truck was provided to law enforcement, it was determined the truck was registered to Hanner, an arrest warrant was issued for his arrest and, nine days after the incident, he was voluntarily taken into custody. (Tr., p.42, Ls.6-16; p.50, Ls.4-8; p.61, L.22 – p.62, L.8.) The state charged Hanner with leaving the scene of an injury accident under I.C. § 18-8007. (R., pp.27-29.) After a jury trial, Hanner was convicted of that crime. (R., p.148.) The district court imposed a sentence of five years with four years determinate. (R., pp.163-165.) Hanner timely appealed. (R., pp.168-170.)

ISSUES

Hanner states the issues on appeal as follows:

I. There was insufficient evidence to support the Jury's Verdict.

II. The Court erred in failing to instruct the jury on the lesser included offense of reckless driving.

III. The Defendant's right to a fair trial was prejudiced by the State's Failure to preserve evidence.

IV. The sentence imposed by the Court was excessive[.]

(Appellant's Brief, p.4 (capitalization original).)

The state rephrases the issues as:

1. Is there substantial evidence in the record to support the jury's verdict finding Hanner guilty of leaving the scene of an injury accident?

2. Has Hanner failed to show any error in the district court's refusal to instruct the jury on reckless driving as a lesser included offense?

3. Is Hanner precluded from appellate review of his claim that his right to a fair trial was violated by the state's failure to preserve evidence because he failed to object below and has failed to argue, much less establish, fundamental error?

4. Has Hanner failed to show that the district court abused its sentencing discretion?

ARGUMENT

I.
There Is Substantial Evidence In The Record To Support The Jury's Verdict Finding Hanner Guilty Of Leaving The Scene Of An Injury Accident

A. Introduction

Hanner argues on appeal that the jury's verdict finding him guilty of leaving the scene of an injury accident was not supported by adequate evidence. (Appellant's Brief, p.5.) Hanner specifically claims the evidence failed to prove he knew or had reason to know that his vehicle hit and injured the victim, Brenda Fullerton.[1] (Id.) Hanner's argument is without merit. Hanner's claim that he did not actually know his truck struck and injured Ms. Fullerton does not negate the substantial evidence that was presented to the jury showing he either knew or reasonably should have known his vehicle hit and injured her.

B. Standard Of Review

An appellate court will not set aside a judgment of conviction entered upon a jury verdict if there is substantial evidence upon which a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Sheahan, 139 Idaho 267, 285-86, 77 P.3d 956, 974-75 (2003); State v. Reyes, 121 Idaho 570, 826 P.2d 919 (Ct. App. 1992). The appellate court will not substitute its view for that of the jury as to the credibility of the witnesses, the weight to be given to the testimony, and the reasonable

[1] Hanner does not contest that Ms. Fullerton was injured by his truck, or that he left the scene of the injury accident; he only contests knowing, or having reason to know, Ms. Fullerton was injured when he left the scene. (*See* Appellant's Brief, p.5.)

inferences to be drawn from the evidence. State v. Hoyle, 140 Idaho 679, 683-84, 99 P.3d 1069, 1073-74 (2004) (plurality); State v. Knutson, 121 Idaho 101, 104, 822 P.2d 998, 1001 (Ct. App. 1991); State v. Decker, 108 Idaho 683, 684, 701 P.2d 303, 304 (Ct. App. 1985).

In determining if the evidence is substantial and competent, it will be considered in the light most favorable to the prosecution. State v. Miller, 131 Idaho 288, 292, 955 P.2d 603, 607 (Ct. App. 1997); Knutson, 121 Idaho at 104, 822 P.2d at 1001. Substantial evidence is present when a "reasonable mind" could conclude that guilt was proved beyond a reasonable doubt. Hoyle, 140 Idaho at 683-84, 99 P.3d at 1073-74.

C. Substantial Evidence Supports The Jury's Verdict That Hanner Knew Or Had Reason To Know He Hit And Injured The Victim With His Vehicle

Hanner contends "[t]here is no doubt from the record that he saw [Ms. Fullerton], but there is certainly a reasonable doubt as to whether he knew or reasonably should have known that he actually struck her." (Appellant's Brief, p.5.) An "appellate court's function is not to weigh and consider the contradictions and inconsistencies which appellant finds in the testimony, but rather to determine whether there is substantial evidence in support of the verdict of the jury, taking the view of the evidence most favorable to the sustained party." State v. Gissel, 105 Idaho 287, 292, 668 P.2d 1018, 1023 (Ct. App. 1983). According to I.C. § 18-8007, "[t]he driver of any vehicle that has been involved in an accident . . . who knows or has reason to know that said accident has resulted in injury to or death of any person" is required to remain at the scene of

that accident and perform certain statutorily defined duties. Therefore, even if there is no evidence directly showing that Hanner actually knew his vehicle struck and injured the victim, that fact alone is not a basis for setting aside the jury's verdict. The relevant inquiry is limited to whether there is substantial evidence in the record supporting the jury's verdict that Hanner knew *or had reason to know* his vehicle had done so. I.C. § 18-8007. Here, the record is rife with substantial evidence that Hanner knew or had reason to know that he was involved in an accident in which the victim was struck and injured by his vehicle, and he left the scene of the accident.

Ms. Fullerton gave the following account of the accident that occurred after she parked her truck on a street and went into a post office:

> I went in to get my mail and I got my mail and I came out and I heard this squealing of tires, and to me, I thought to myself there must be a 16-year-old kid that just got his dad's truck for the night and doesn't have to pay for these tires because he was just burning them as hard as he could and it scared me. I was like, wow, I'm getting out of here before that idiot gets on the road. And as fast as he was going, I thought there was no way he could come my direction and he would have been going the other way . . . so I was just hurrying to get into my truck.
>
> And I walked around the front of my truck and I got to my door and something said don't open that door, and I looked up and he's coming right at me and at first I [sic] was slow motion and it happened so fast and his headlights were right in my eyes, and I mean I was like, wow, and I didn't open my door, I turned to run and I took two steps and the back end of his truck struck me and just smashed me up against my truck, slid me across the front and flipped me up in the air and down on the ground and he's still burning his tires, just left and left me there laying on the ground.

(Tr., p.31, L.23 – p.32, L.21.)

Ms. Fullerton reiterated that the headlights from Hanner's truck were "directly in her eyes," and testified, "[i]f he didn't see me, he had his eyes shut. I couldn't see for [sic] light, that's how close he was to me." (Tr., p.35, Ls.13-16.) When asked by the prosecutor, "[i]n your mind, is there any question that he knew he hit you?," Ms. Fullerton answered "[n]one." (Tr., p.36, Ls.14-15.) Hanner's trial counsel asked Ms. Fullerton to explain why she believed Hanner "knew he hit you" (Tr., p.36, Ls.24-25), and she responded:

> Because anytime I'm driving anything in my lights, even a mouse that runs across the road, you can see it. You can't tell me that I seen four headlights in my eyes and he didn't see me. I find that so hard to believe.

(Tr., p.37, Ls.1-5.)

Ms. Fullerton's testimony that the four headlights of Hanner's truck were directly in her eyes just before it hit her gave the jury substantial evidence that Hanner knew, or, had reason to know, his truck had struck and injured her before he left the accident scene.

In addition, Justin Mangis testified that he saw Hanner's truck spin out and its back end hit Ms. Fullerton "as she was walking around as [sic] she was starting to get into her vehicle it looked like because she turned to run and that's when it hit the back of the vehicle . . .." (Tr., p.8, L.23 – p.9, L.8.) Mr. Mangis noticed Ms. Fullerton's truck appeared to have been dented from where her body had been pushed into it when Hanner's truck hit her. (Tr., p.13, L.10 – p.14, L.6.) Deputy Sheriff Williams confirmed that he also saw a dent on the side of Ms. Fullerton's truck, which he measured from to get the distance Ms. Fullerton had been thrown from her truck. (Tr., p.13, Ls.10-24; p.45, L.25 – p.46, L.5.)

Another eyewitness, Brandy Hayes, testified that after Hanner's truck fishtailed out of the parking lot:

> I thought for sure he was going to roll over, and then when the rear end of the pickup swung back around toward the Post Office, there was a pickup truck parked in front of it, a white Dodge truck, *and I saw it rock back and forth like it had been hit* and customers from the parking lot had ran over in front of the Post Office and a woman had come back and said call 911.

(Tr., p.20, L.24 – p.21, L.7 (emphasis added).) The effect that Hanner's truck had in causing Ms. Fullerton's truck to be dented and to rock back and forth like it had been hit, as testified to by Justin Mangis and Brandy Hayes, was strong evidence Hanner had to have known (or should have known) that his truck directly impacted Ms. Fullerton's truck, or worse, struck Ms. Fullerton as she was sandwiched between the two trucks.

Moreover, about a week after the accident, Deputy Sheriff Williams interviewed Hanner, who explained that on the night of the accident he and his girlfriend had been in an argument while at the Maverik store, he squealed his tires going out of the Maverik parking lot, he lost control of his truck, he saw Ms. Fullerton standing by her truck, and he saw Ms. Fullerton running. (Tr., p.51, Ls.6–25.)

In sum, there was substantial evidence to support the jury's finding that Hanner either knew or had reason to know his truck struck and injured Ms. Fullerton. Although Hanner did not admit he actually knew his truck hit and injured Ms. Fullerton, the testimony presented at trial provided substantial evidence whereby a jury could have reasonably concluded he knew it had. The testimony all the more clearly established, alternatively, that, whether he had

actual knowledge or not, Hanner had reason to know Ms. Fullerton was hit and injured by his truck. Consequently, there is no basis for Hanner's contention that there was insufficient evidence to convict him.[2]

II.

Hanner Has Failed To Show Any Error In The District Court's Refusal To Instruct The Jury On Reckless Driving As A Lesser Included Offense

Hanner claims the district court "erred by failing to instruct the jury and give them the opportunity to deliberate regarding a lesser included offense of Reckless Driving." (Appellant's Brief, p.6 (capitalization original).) This claim is without merit.

"An offense will be deemed to be a lesser included offense of another, greater offense, if all the elements required to sustain a conviction of the lesser

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[2] In the last paragraph of Hanner's brief of his "insufficient evidence" issue, he adds two entirely new issues, stating:

> In addition, it was prejudicial to the Defendant and created confusion to the jury for the investigating Officer Aaron Williams to be asked if the Defendant's statement regarding knowledge of hitting the victim was contradicted by his girlfriend and then be cut-off by the Court regarding any further direct or cross-examination. (Tr., Pg.47[.]) As indicated the Appellant asserts as part of this issue that his right to a fair trial was denied by not being allowed to mention his girlfriend Jessica Simmons or call her as a witness.

(Appellant's Brief, p.5.) Contrary to Hanner's claim, the record does not show the trial court cut his attorney off "regarding any further direct or cross-examination." (*See* Tr., p.47, L.5 – p.48, L.3.) Instead, the court appears to have merely precluded the prosecutor from presenting obvious hearsay testimony through Officer Williams about what Hanner's girlfriend said. (Id. (off the record discussion after the prosecutor asked the officer if Hanner's denial that he knew he had hit Ms. Fullerton "contradict[ed] the statements of his girlfriend").) Moreover, the record does not reflect that the trial court denied Hanner the opportunity to call his girlfriend as a witness, or mention her. (*See generally* Tr., p.92, L.18 – p.105, L.21.) Given the lack of any evidentiary basis for Hanner's additional arguments, no further response by the state is warranted.

included offense are included within the elements of the greater offense," or "if in committing an offense one necessarily commits a second offense." State v. Cariaga, 95 Idaho 900, 902, 523 P.2d 32, 34 (1974) (citations omitted). As the Idaho Court of Appeals has recognized, "[t]here are two theories by which an offense may be deemed a lesser included offense – statutory theory and pleading theory." State v. Cochran, 149 Idaho 688, 690, 239 P.3d 793, 795 (Ct. App. 2010). More recently, in State v. Flegel, 151 Idaho 525, 261 P.3d 519 (2011), the Idaho Supreme Court applied both the statutory and pleading theories to determine whether sexual abuse is a lesser included offense of lewd conduct, expressing no preference for one test versus the other, and providing no indication that one test applies to state constitutional claims while the other applies to federal constitutional claims.

"Under the statutory theory, a crime may be a lesser included offense if its elements are necessarily included in the greater crime, as the greater crime is defined by statute." Cochran, 149 Idaho at 690, 239 P.3d at 795. *See also* State v. Curtis, 130 Idaho 522, 524, 944 P.2d 119, 121 (1997) ("For an offense to be an included offense of a charged offense under the statutory theory, it must be impossible to commit the greater offense without having committed the lesser offense."). The offense of leaving the scene of an injury accident can be committed without the driver of the vehicle involved in an accident having driven recklessly. Idaho Code § 18-8007 requires that "[t]he driver of any vehicle that has been involved in an accident . . . who knows or has reason to know that said accident has resulted in injury to or death of any person" stop at the scene

of the accident and remain until the driver has fulfilled all the requirements listed under the statutory provisions. I.C. § 18-8007(1)(a)-(e). Because there is no element of reckless (or even negligent) driving that must be proven in order to commit the crime of leaving the scene of an injury accident, reckless driving is not a lesser included offense to that crime under the statutory theory.

Under the pleading theory, an offense is an included offense if the state has pled the elements of the lesser included offense as the means whereby the defendant committed the greater offense. Curtis, 130 Idaho at 524, 944 P.2d at 121. The Information in Hanner's case alleged that Hanner "was the driver of a vehicle involved in an accident at 110 West Ririe Highway, and willfully failed to stop, remain, give information, and render aid, knowing or having reason to know that a person was injured as a result of the accident." (R., p.27.) The Information made no mention of any culpable driving, much less reckless driving; therefore, under the pleading theory, the district court properly refused to instruct the jury that reckless driving was a lesser included offense to the crime of leaving the scene of an injury accident.

Under either the statutory or pleading theory, Hanner has failed to show the district court erred in denying his request to instruct the jury that reckless driving is a lesser included offense to the crime of leaving the scene of an injury accident.

III.
Hanner Is Not Entitled To Appellate Review Of His Claim That His Right To A Fair Trial Was Violated By The State's Failure To Preserve Evidence Because He Failed To Object Below And Has Failed To Argue, Much Less Establish, Fundamental Error

A. Introduction

For the first time on appeal, Hanner argues that his due process right to a fair trial was violated because the state recorded over the tape recording of his interview by Officer Williams. (Appellant's Brief, pp.7-8.) This Court must decline to consider the merits of Hanner's due process claim because he did not assert it below and, therefore, failed to preserve the issue for appeal. Even if reviewed, Hanner has failed to demonstrate any due process violation, much less one amounting to fundamental error.

B. Standard Of Review

On appeal of a claimed due process violation, the appellate court will defer to the factual findings of the trial court if supported by substantial evidence. State v. Avelar, 124 Idaho 317, 322, 859 P.2d 353, 358 (Ct. App. 1993).

C. Hanner Has Failed To Preserve His Due Process Claim For Appeal

"Generally Idaho's appellate courts will not consider error not preserved for appeal through an objection at trial." State v. Perry, 150 Idaho 209, ___, 245 P.3d 961, 976 (2010) (citing State v. Johnson, 126 Idaho 892, 896, 894 P.2d 125, 129 (1995)). Nor will Idaho's appellate courts "review a trial court's alleged error on appeal unless the record discloses an adverse ruling which forms the basis for the assignment of error." State v. Fisher, 123 Idaho 481, 485, 849 P.2d

942, 946 (1993); *see also* State v. Olson, 138 Idaho 438, 442, 64 P.3d 967, 971 (Ct. App. 2003) (citing State v. Barnett, 133 Idaho 231, 235, 985 P.2d 111, 115 (1999)). In this case, Hanner waived appellate consideration of his due process claim by failing to make any objection or file an appropriate motion upon learning that the tape recording of his interview with Officer Williams no longer existed because it was recorded over with other matters. (*See generally* Tr., p.79, L.14 – p.81, L.9; *see also* Appellant's Brief, pp.7-8.) Because the issue was neither presented to, nor decided by the trial court, this Court must decline to consider the merits of Hanner's due process claim.

D. Hanner Has Failed To Demonstrate That The Recording-Over Of The Interview Tape Constitutes Fundamental Error

An exception to the principle that an objection to a constitutional violation must be made in the trial court exists if the alleged error is fundamental. Perry, 150 Idaho at ___, 245 P.3d at 976. The burden of demonstrating fundamental error rests squarely with the defendant asserting the error for the first time on appeal. Id. at ___, 245 P.3d at 980; State v. Severson, 147 Idaho 694, 717, 215 P.3d 414, 437 (2009). To carry that burden, a defendant claiming error for the first time on appeal must demonstrate that the error he alleges "(1) violates one or more of [his] unwaived constitutional rights; (2) plainly exists (without the need for any additional information not contained in the appellate record, including information as to whether the failure to object was a tactical decision); and (3) was not harmless." Perry, 150 Idaho at ___, 245 P.3d at 980. However, Hanner has not presented any argument on appeal that the recording-over of his taped

interview constitutes fundamental error under the standards articulated in Perry. (*See* Appellant's Brief, pp.7-8.) Even if Hanner had presented a fundamental error argument in this appeal, it would not have merit.

Hanner cannot show a violation of one or more of his unwaived constitutional rights. Perry, 150 Idaho at ___, 245 P.3d at 980. It is well-established that the state does not violate a defendant's due process rights if it loses or destroys evidence that is only potentially useful to the defense unless that destruction is shown to be in bad faith. Arizona v. Youngblood, 488 U.S. 51, 58 (1988); State v. Bennett, 142 Idaho 166, 170-71, 125 P.3d 522, 526-27 (2005). Hanner claims that the "police reports summarizing [his] interview were contradictory to what [he] asserts was actually said during the course of his discussion with Officer Williams and would have been reflected on the tape recording." (Appellant's Brief, p.7.) The only discernable conflict between the testimony of Hanner and Officer Williams reflected in the record is that the officer stated that Hanner admitted during his interview that he saw Ms. Fullerton running, which Hanner denied having said. (Tr., p.51, Ls.21-25; p.99, L.21 – p.100, L.2.) Given that conflicting testimony, the lost or destroyed tape recording is only potentially useful to Hanner because it cannot be said with absolute certainty what it would have shown. Therefore, Hanner is required to show bad faith on the part of law enforcement in allowing the tape recording of his interview to be recorded over. However, there is no indication in the record that officers acted in bad faith by allowing the taped interview to be recorded over, and Hanner has pointed to none. To the contrary, the explanation as to how

Hanner's interview was taped over indicates it was done accidentally. The prosecutor told the trial court:

> What happened, according to the officer, when he went into the interview room he thought that they actually recorded – turned on. What happened is it was continuous and it got recorded over, so there is no such recorded document that we could provide. The only thing that we have which we've provided is the officer's report in regards to the interview. There is no such recording.

(Tr., p.80, Ls.12-19.)

Even if the officers acted negligently in maintaining the tape recording of Hanner's interview, such negligence does not rise to the level of bad faith. Youngblood, 488 U.S. at 58 (destruction of potentially exculpatory evidence due to negligence, not bad faith); State v. Dopp, 129 Idaho 597, 607, 930 P.2d 1039, 1049 (Ct. App. 1996). Hanner has failed to show any bad faith by law enforcement, and in turn, any due process violation by the recording-over of his taped interview. Therefore, he has failed to meet the first requirement for showing fundamental error under Perry, that one of his constitutional rights was violated. Because Hanner cannot demonstrate a violation of a constitutional right, he necessarily cannot meet the second and third requirements for fundamental error -- that the constitutional error plainly exists and that the error was not harmless.[3] Perry, 150 Idaho at ___, 245 P.3d at 980. Hanner has

[3] The trial court did not determine whether the testimony of Officer Williams or Hanner was more credible as to whether Hanner said during his interview that he had seen Ms. Fullerton running, and no evidence that law enforcement recorded over the tape of the interview in bad faith was presented. Therefore, Hanner has failed to meet the second requirement for showing fundamental error under Perry, that the constitutional violation must be "plain," or "clear" from the record. Perry, 150 Idaho at ___, 245 P.3d at 977. Hanner should not be excused from having to meet that burden. Further, the only disputed statement from Hanner's

therefore failed to demonstrate fundamental error by the state's apparent inadvertent recording-over of his taped interview with Officer Williams.

IV.
Hanner Has Failed To Show That The District Court Abused Its Sentencing Discretion

A. Introduction

The district court imposed a sentence of five years with four years determinate. (R., pp.163-165.) Hanner argues this sentence was an abuse of the district court's discretion, contending he should have been permitted to enter the Wood Pilot Project, a specialty court program,[4] he intended no harm to Ms. Fullerton, he had taken responsibility for his crime by turning himself in to law enforcement after he learned Ms. Fullerton had been injured, and he expressed extreme remorse for her injuries. (Appellant's Brief, pp.8-10.) Hanner has failed to show that the district court's view of the case was unreasonable.

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interview is whether, after telling the officer he saw Ms. Fullerton by the front of her truck (as he struggled to straighten his truck out; *see* Tr., p.99, L.18 – p.100, L.3), Hanner also said he saw her running. Hanner cannot meet the third Perry factor by showing this alleged error was not harmless, i.e., that it "must have affected the outcome of the trial proceedings." Id. Even if Hanner's testimony that he told the officer he saw Ms. Fullerton by the front of her truck – not running – as he struggled to control his truck had not been contradicted, such a slight difference in testimony could not possibly have made a difference in the jury's determination that Hanner knew, or had reason to know, his truck hit and injured Ms. Fullerton.

[4] According to Hanner's trial counsel, the "Wood Court Pilot Project . . . starts out with individuals in custody, then after [inmates have] shown progress in custody are [sic] moved into the work release program." (Tr., p.124, Ls.6-10.) It is unclear from the appellate record how that program differs from an inmate being allowed to, as the district court phrased it, "participate in the work center," which the court did not "object" to, assuming Hanner qualified for such participation. (Tr., p.144, Ls.11-14.)

B. Standard Of Review

When a sentence is within statutory limits, the appellate court will review only for an abuse of discretion. State v. Farwell, 144 Idaho 732, 736, 170 P.3d 397, 401 (2007).

C. Hanner Has Failed To Show That The District Court Abused Its Sentencing Discretion

To bear the burden of demonstrating an abuse of discretion, the appellant must establish that, under any reasonable view of the facts, the sentence was excessive. State v. Farwell, 144 Idaho 732, 736, 170 P.3d 397, 401 (2007). To establish that the sentence was excessive, he must demonstrate that reasonable minds could not conclude the sentence was appropriate to accomplish the sentencing goals of protecting society, deterrence, rehabilitation, and retribution. Farwell, 144 Idaho at 736, 170 P.3d at 401. In determining whether the appellant met his burden, the court considers the entire sentence but, because the decision to release him on parole is exclusively the province of the executive branch, presumes that the determinate portion will be the period of actual incarceration. State v. Oliver, 144 Idaho 722, 726, 170 P.3d 387, 391 (2007).

The district court noted that Hanner did seem to show sincere remorse for the injuries sustained by Ms. Fullerton, that he was a skilled worker with a supportive family, and he had alcohol and mental health issues. (Tr., p.137, L.7 – p.142, L.22.) The court stated that it was very familiar with the "Wood Pilot Program," and explained that space in that program was limited. (Tr., p.137, Ls.16-17.) Nevertheless, after considering Hanner's criminal record, the four

sentencing factors under State v. Toohill, 103 Idaho 565, 650 P.2d 707 (Ct. App. 1982), and the criteria under I.C. § 19-2521 for determining whether prison or probation is appropriate, the district court was well within its discretion in concluding that a unified sentence of five years with four years fixed was appropriate. (Tr., p.135, L.24 – p.143, L.11.)

The district court took into account that Hanner had six prior felony convictions, nine prior misdemeanors, seven prior juvenile offenses, and had violated his probation five times. (Tr., p.135, L.24 – p.136, L.2.) The court also noted that Hanner had a "prior conviction as a minor for failure to stop after an accident, that in the past [Hanner] provided false information to police officers and that [Hanner's] record shows that [he has] difficulty with honesty because there's nine burglaries or thefts in [his] record." (Tr., p.136, Ls.11-18.) According to Hanner's trial counsel, Hanner had a "pretty long record," and "had been to prison several times," prior to his release on parole four years earlier.[5] (Tr., p.123, Ls.17-19; p.126, Ls.7-9.)

The district court next explained that the Toohill factors that leapt out in this case were the paramount need to protect society and punishment (or retribution) which the court described as simply "another form of accountability." (Tr., p.137, Ls.19-25.) The court viewed "deterrence" as an important sentencing factor generally, but explained that because Hanner had spent so much time in prison, more prison time might not deter him from committing more crimes. (Tr., p.138, Ls.1-6.) In regard to "public" (i.e., general) deterrence, the court stated

[5] The presentence report has not been made a part of the appellate record.

that although it was not a major concern, too light of a sentence would send the wrong message to the community. (Tr., p.138, Ls.3-8.) Finally, the court observed that although rehabilitation is always possible, given the "access to many different programs and opportunities" Hanner had been given which did not seem to make a difference in his life, it would not focus too heavily on that factor. (Tr., p.138, Ls.9-14.)

The district court then engaged in a point-by-point review of the criteria set out in I.C. § 19-2521 for determining whether prison (vis-à-vis probation) is appropriate (Tr., p.138, L.15 – p.141, L.11), and concluded that the factors weighed against granting probation:

> Again, it's very easy for me to find almost every factor favoring criminal incarceration in this case and it's very hard for me to find any of the factors that would justify probation.
>
> So as I look at the aggravating and mitigating factors in this case, we have very serious injuries, multiple offenders [sic], extremely reckless conduct that you should have known had a high risk of harming somebody and you couple that with some alcohol [sic].

(Tr., p.141, Ls.12-20.)

After considering all the information before it, the court sentenced Hanner to a unified five-year prison term, with four years fixed, and explained its own reasoning:

> As I thought about this case, I very seriously thought about recommending or sentencing you just to five years straight, because certainly I think the conduct would justify it. The reason I'm giving you a minimum of four and not just having you do the whole five is because I think giving you four years will give you some incentive to behave yourself and perform well so that you can earn that year to get let out early. . . .

> My other concern is that when you are released from prison, if I were to give you the straight five you'd be released without any supervision of any kind and I think it's in your best interest and society's best interest when you are released from prison that you have some supervision, as least for a year period of time and so that's going to be the order of the Court.
>
> . . . .
>
> I am going to recommend that you be evaluated when you're in the RDU. If they think that you would benefit from placement in the therapeutic community, I have no objection to that. There's been a recommendation that you participate in the work center. If you qualify for that, again, I have no objection to that.

(Tr., p.143, L.12 – p.144, L.14.)

In imposing its sentence of five years with four years fixed, the district court reviewed the statutory penalty, the serious nature of Hanner's crime, his extensive criminal record – including two previous stints in prison, the four sentencing factors of Toohill, and each of the statutory factors for determining whether imprisonment is appropriate. The court reasonably concluded that, in light of all the factors, although five years imprisonment would have been appropriate, allowing Hanner the chance to earn parole after four years would best serve the interests of society and Hanner. When the entirety of the record is considered, Hanner has failed to show the sentence excessive under any reasonable view of the facts.

CONCLUSION

The state respectfully requests this Court to affirm Hanner's conviction and sentence.

DATED this 7th day of December, 2011.

JOHN C. McKINNEY
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 7th day of December, 2011, I caused two true and correct copies of the foregoing BRIEF OF RESPONDENT to be placed in the United States mail, postage prepaid, addressed to:

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